IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM—1938.

No. 210

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MEYERS, and A. J. KASH,

Petitioners,

vs.

MRS GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, his Guardian ad Litem,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

ROBERT BRENNAN,
LEO. E. SIEVERT,
H. K. LOCKWOOD,
Kerckhoff Building, Los Angeles, California
Counsel for the Pullman Co., Petitioner.

C. S. WILLISTON,
Chicago, Illinois,
M. W. REED,
Los Angeles, California,
Of Counsel for The Pullman Company.

DAVID LIVINGSTON,
LAWRENCE LIVINGSTON,
Russ Building, San Francisco, California,
Counsel for A. J. Kash, Petitioner

LIVINGSTON & LIVINGSTON,
LEONARD J. BLOOM,
Of Counsel for A. J. Kash.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

PAGE

STATUTES. PAGE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM—1938.

No. .....

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MEYERS, and A. J. KASH,

Petitioners,

vs.

MRS GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, his Guardian ad Litem,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners, The Pullman Company, a corporation, and A. J. Kash, respectfully file and submit this as their petition for a writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

The Circuit Court of Appeals on April 19, 1938, by a divided court reversed a decision and judgment of the District Court of the United States for the Southern District of California, Central Division, in favor of petition-

ers herein and against respondents, 96 Fed. (2d) 405. Petitions for rehearing were later filed and were denied on June 3, 1938. [Tr. 162.] Mandate has been stayed by proper order [Tr. 162] and the cause is now filed and docketed herein for decision.

Summary Statement of the Matter Involved.

On September 27th, 1935, Mrs. Garnett V. Jenkins and Robert W. Jenkins, a minor, by Mrs. Garnett V. Jenkins, his Guardian *ad Litem*, widow and minor son of Robert L. Jenkins, deceased, commenced in the Superior Court of Los Angeles County, California, an action for the alleged wrongful death of said decedent, against the Southern Pacific Company, The Pullman Company, A. J. Kash, H. A. Hatch, and two fictitious defendants, John Doe One and John Doe Two. [Tr. 5.]

The complaint alleged that the deceased was a railroad conductor employed by the Southern Pacific Company, and on a certain date was "in charge of the train running between Los Angeles and San Francisco, in the State of California." [Tr. 8.] The Pullman Company owned and maintained certain sleeping cars comprising part of the train. Defendant Hatch was the Pullman conductor on the same train. John Doe One was the Pullman porter and John Doe Two was the railroad's gate tender at the passenger depot at Los Angeles. Kash was a passenger on the train.

It was alleged that the decedent Jenkins, "acting within the scope of his employment", [Tr. 8] was requested by Pullman conductor Hatch to assist him in quelling a disturbance on such train which was being created by Kash while in an intoxicated condition. Despite Jenkins' and

Hatch's efforts, Kash persisted in his conduct and Jenkins called the police at Ventura, California. While Kash was being taken from the train by the police, he struck Jenkins and the blow caused death. Kash was of course guilty of assault. The Southern Pacific Company and the gate tender, John Doe Two, were charged with negligence in permitting a disorderly person to board the train. It was alleged that The Pullman Company and John Doe One permitted a drunken and disorderly person to board a Pullman sleeper without a ticket. No negligence on the part of Hatch was alleged.[1]

A separate count charged Kash alone with the assault.

On November 20, 1935, The Pullman Company, an Illinois corporation, duly filed its notice of motion to remove the cause to the United States District Court, together with the usual petition and bond. [Tr. 31-33-37.] The grounds for removal were diversity of citizenship and a separable controversy. The fictitious defendants John Doe One and John Doe Two had not been served with process and no cause of action was alleged against the Southern Pacific Company or Hatch. On November 25, 1935, the petition for removal was presented to the state court which made its order duly removing the cause to

---

[1]The opinion of the Circuit Court of Appeals first says that "The Pullman conductor and the Pullman porter permitted Kash to board the train." [Tr. 146.] This was alleged in the second amended complaint (filed after removal) but not in the original and first amended complaints. In these it was alleged only that it was the Pullman porter who permitted Kash to board the train. The error is corrected later in the opinion. [Tr. 9, 24, 61, 148.]

the United States District Court for the Southern District of California, Central Division. [Tr. 41.] On the same day, but after the petition for removal had been granted, an amended complaint was filed in the state court. [Tr. 18.] The plaintiffs in both the original and first amended complaint were the widow and minor son suing in their individual capacities as heirs. By stipulation and order thereon entered in the District Court December 27, 1935, Mrs. Garnett V. Jenkins, as administratrix of the Estate of Robert L. Jenkins, deceased, was substituted as plaintiff, instead of Mrs. Garnett V. Jenkins in her individual capacity and Robert W. Jenkins, by his Guardian *ad Litem*. [Tr. 47, 48.] After the record was lodged with the District Court, and on January 22, 1936, the plaintiffs filed a motion to remand to the state court. [Tr. 50.] While this motion to remand was pending and on February 8, 1936, the plaintiffs filed a second amended complaint in the District Court. [Tr. 55.] In this second amended complaint plaintiffs for the first time alleged negligence on the part of Hatch and brought the case against the Southern Pacific Company within the Employers' Liability Act. [Tr. 55.] On February 19, 1936, the District Judge denied the motion to remand. No exception was taken to this order.

Thereafter and on December 21, 1936, an instrument, denominated by the parties thereto as a covenant not to sue, was entered into between the plaintiffs and defendant Southern Pacific Company [Tr. 116] and Mrs. Jenkins, as administratrix of the estate of her deceased husband, applied for and obtained permission of the probate department of the state court to execute such instrument. [Tr. 122.] The Southern Pacific Company paid $2500.00 to

the plaintiffs therefor and plaintiffs filed with the District Court a dismissal of the action and obtained an order of dismissal from the District Judge. These facts were set up by the remaining defendants in supplemental answers. [Tr. 97, 99, 100.]

On December 29, 1936, the action was tried by the District Judge, a jury having been duly waived. [Tr. 102.] The supplemental answers above mentioned having raised the defense of a release of a joint tort feasor, that issue was tried as a plea in bar. The District Judge found that the Southern Pacific Company was a joint tort feasor with the other defendants and that it had been released. Since this necessarily released the remaining defendants judgment was ordered in their favor and duly entered. [Tr. 108.] The plaintiffs appealed to the Circuit Court of Appeals. [Tr. 128-131.] A majority of the Circuit Court, speaking through Circuit Judge Bert E. Haney, did not consider the merits of the plea in bar but held that the District Court should have remanded the case. It held that the subsequent amendments related back to the time of filing the original complaint [Tr. 155] and therefore the railroad company and the Pullman conductor should not be disregarded in determining the question of the removability of the case. It based its decision upon the contents of the *second amended complaint* which was filed after the case had been effectually removed to the District Court. The Court based its opinion upon the remand statute (28 U. S. C. A., Sec. 80; Judicial Code, Par. 37). Circuit Judge Mathews dissented, holding that the case had been properly removed and that the motion to remand was properly denied. He agreed with the trial judge that the release of the Southern Pacific Company released the remaining defendants.

Question Presented.

IN A CASE IN WHICH, ON THE COMPLAINT FILED IN A STATE COURT, A NON-RESIDENT DEFENDANT DULY EXERCISES ITS RIGHT OF REMOVAL, THE REQUISITE JURISDICTIONAL AMOUNT AND A SEPARABLE CONTROVERSY BOTH EXISTING, CAN THE PLAINTIFF BY AMENDING THE COMPLAINT IN THE DISTRICT COURT, SO AS, FOR THE FIRST TIME, TO STATE CAUSES OF ACTION AGAINST CO-DEFENDANTS, THEREBY OUST THE DISTRICT COURT OF JURISDICTION AND DEPRIVE THE NON-RESIDENT DEFENDANT OF ITS RIGHT OF REMOVAL AND RIGHT TO HAVE ITS CASE TRIED IN SUCH COURT?

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Jacobson v. Chicago, M. & St. P. R. Co.*, 66 Fed. (2d) 688, and the decision of the Tenth Circuit Court of Appeals in the case of *Mecom v. Fitzsimmons Drilling Co.*, 47 Fed. (2d) 28 (reversed on other grounds, 284 U. S. 183, 76 L. Ed. 233).

2. The Circuit Court of Appeals decided a question involving federal law and procedure in a way in conflict with the principles pronounced by this court in the cases of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, ... U. S. ....., 82 L. Ed. 541, 58 Sup. Ct. 586; and *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

3. The Circuit Court of Appeals has decided two important questions of federal law which have not been, but should be, settled by this Court:

A. It has held that, where a plaintiff brings in a state court an action under the Federal Employers' Liability

Act against a railroad company for the alleged wrongful death of an employee and in the same complaint joins therewith a cause of action under a state wrongful death statute against a non-resident defendant (not the railroad company) for damages on account of the death of such decedent, different acts of negligence being charged against each defendant, the non-resident defendant, though diversity of citizenship and the jurisdictional amount being present, cannot remove the action to the proper District Court.

B. It has held that, in a case in which, on the complaint filed in a state court, a non-resident defendant duly exercised its right of removal, the requisite jurisdictional amount and a separable controversy both existing, the plaintiff can thereafter by amending the complaint in the District Court so as, for the first time, to state a cause of action under the Federal Employers' Liability Act against a co-defendant oust the District Court of jurisdiction and thereby deprive the non-resident defendant of its right of removal and its right to have the case against it tried in the federal court.

Your petitioners present herewith as part of this petition a brief setting forth more fully their views upon the questions involved, and also a transcript of the record in the Circuit Court of Appeals.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the

record and all proceedings in said Circuit Court of Appeals in the said case therein entitled, "Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian *ad Litem*, Appellants, versus The Pullman Company, a corporation, H. J. Hatch, Edward E. Meyers and A. J. Kash, Appellees, No. 8558," to the end that said case may be reviewed and determined by this Court, and that the said judgment of the Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

THE PULLMAN COMPANY,
Petitioner;
By ROBERT BRENNAN,
LEO E. SIEVERT,
H. K. LOCKWOOD,
Counsel;

C. S. WILLISTON,
M. W. REED,
Of Counsel.

A. J. KASH,
Petitioner;
By DAVID LIVINGSTON,
LAWRENCE LIVINGSTON,
Counsel.

LIVINGSTON & LIVINGSTON,
LEONARD J. BLOOM,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(1) The Opinions and Decisions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed April 19, 1938, and is reported in 96 Fed. (2d) 405, and at page 144 *et seq.* of the transcript. It was written by Circuit Judge Bert E. Haney, Circuit Judge Francis A. Garrecht concurring and Circuit Judge Clifton Mathews dissenting. The opinion of the United States District Court (Judge Leon R. Yankwich) was filed January 22, 1937, and is reported in 17 Fed. Supp. 820. Petitions for rehearing were filed by The Pullman Company on May 18, 1938, and by A. J. Kash on May 28, 1938. These petitions were denied on June 3, 1938. [Tr. p. 162.]

(2) Jurisdiction.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code (28 U. S. C. A., Par. 347). The petition is filed in accordance with rule 38 of this Court.

(3) Statement of the Case.

A statement of the case will be found under the heading "Summary Statement of the Matter Involved" in the petition for writ of certiorari to which this brief is annexed. In the interest of brevity the statement will not be repeated.

(4) Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the plaintiffs by amending their complaint in the District Court so as, for the first time, to state a cause of action against the Southern Pacific Company under the Federal Employers' Liability Act and a cause of action against defendant Hatch under the state law, thereby *ipso facto* ousted the District Court of jurisdiction and compelled it to remand the entire case to the state court, despite the fact that The Pullman Company, a non-resident defendant, had duly exercised its right of removal.

2. The Circuit Court of Appeals erred in holding that where, in a complaint filed in a state court, a cause of action under the Federal Employers' Liability Act against a railroad company for wrongful death of its employee, is joined with a cause of action for the same death under a state statute against a non-resident defendant, diversity of citizenship and the jurisdictional amount being present, such non-resident defendant could not properly remove the case to the United States District Court.

3. The Circuit Court of Appeals erred in holding that the second amended complaint, filed in the District Court, wherein for the first time the plaintiffs alleged a cause of action under the Federal Employers' Liability Act against the Southern Pacific Company and a cause of action against defendant Hatch, so operated upon the record and related back to the date of filing the original complaint in the state court as to oust the jurisdiction of the District Court and compel it to remand the case.

4. The Circuit Court of Appeals erred in reversing the District Court and ordering it to remand the case to the state court thereby depriving The Pullman Company, a non-resident defendant, of its right to have the case against it heard and determined in the federal court.

(5) Summary of the Argument.

IN A CASE IN WHICH, ON THE COMPLAINT FILED IN A STATE COURT, A NON-RESIDENT DEFENDANT DULY EXERCISED ITS RIGHT OF REMOVAL, THE PLAINTIFF CANNOT BY AMENDING THE COMPLAINT IN THE DISTRICT COURT, SO AS, FOR THE FIRST TIME, TO STATE CAUSES OF ACTION AGAINST CO-DEFENDANTS, THEREBY OUST THE DISTRICT COURT OF JURISDICTION AND DEPRIVE THE NON-RESIDENT DEFENDANT OF ITS RIGHT OF REMOVAL AND RIGHT TO HAVE ITS CASE TRIED IN THE DISTRICT COURT.

In order to present the argument in support of the foregoing proposition logically and concisely, such argument falls into the following subdivisions:

1. At the time The Pullman Company's petition for removal was filed and presented to the state court, the case, as pleaded, was properly removable to the District Court.

2. The filing in the state court after the order of removal had been made of a first amended complaint did not destroy The Pullman Company's right of removal, and the said first amended complaint did not present a case which could not have been removed had said amended complaint been the original complaint.

3. The filing by plaintiffs of a motion to remand in the District Court merely required that court to examine the record as it existed in the state court at the time the

petition for removal was filed and determine whether or not the state court properly ordered the case removed.

4. The plaintiffs, by entering into a stipulation substituting Mrs. Jenkins, administratrix, as plaintiff in the place of herself and minor son, heirs, as plaintiffs and requesting the District Court to exercise its power by ordering such substitution thereby waived any right to ask that the action be remanded.

5. The plaintiffs, by filing a second amended complaint in the District Court, praying judgment therefrom, thereby abandoned all former pleadings, including the motion to remand, and the case stood as if at that moment it had then been filed in said District Court.

6. Even though the original complaint had contained all the allegations of the second amended complaint still The Pullman Company would have been entitled to remove the case to the District Court.

7. Once a case is properly removed to the District Court, subsequent amendments to the pleadings, adding a cause of action against another defendant, cannot oust the jurisdiction of the District Court.

8. The judgment of the Circuit Court is in conflict with the decisions of two other Circuit Courts of Appeal.

9. The judgment of the Circuit Court is at variance with principles of law pronounced by this Court.

10. The Circuit Court has ruled upon two important questions of federal law which have not but should be decided by this Court.

11. Had the Circuit Court considered the case on its merits, the judgment of the District Court would have been affirmed.

(6) ARGUMENT.

POINT I.

The Removal Was Proper.

The original complaint comprised two separately stated causes of action, in one count negligence of The Pullman Company was alleged and damages in the sum of $50,000.00 against it were prayed; in the other, the assault by Kash was pleaded and damages in the sum of $50,000.00 against him were prayed. [Tr. pp. 13-16.] This was proper and permissible under California law since the suit was by the heirs of decedent. California Code of Civil Procedure, 377; California Code of Civil Procedure, 427. The controversy between plaintiffs and The Pullman Company was separable from the controversy between the plaintiffs and defendant Kash. *Judicial Code,* Section 28, U. S. C. A. Title 28, Section 71. Therefore The Pullman Company, a non-resident defendant, was entitled to remove the case to the District Court.

Barney v. Latham, 103 U. S. 205;

Hyde v. Ruble, 104 U. S. 407, 409;

Salem Co. v. Manufacturers Co., 264 U. S. 182;

St. Paul Merc. Co. v. Red Cab Co., ... U. S. ....., 82 L. Ed. 541; 58 Sup. Ct. 586;

Kirby v. American Soda Fountain Co., 194 U. S. 141;

Travelers Assn. v. Smith, 71 Fed. (2d) 511;

Adderson v. Southern Ry. Co., 177 Fed. 571;

Murray v. So. Bell Tel. Co., 210 Fed. 925;

Hartman et al. v. N. Y. & Miami S. S. Co., 16 Fed. Supp. 479.

Although the Pullman conductor Hatch was named as a defendant in the first count, no cause of action was pleaded against him.

On a petition for removal, a defendant against whom no cause of action is stated will not be considered.

Cella v. Brown, 144 Fed. 742; certiorari denied 202 U. S. 620;

Chicago Co. v. Stepp, 151 Fed. 908;

Bryce v. Southern Co., 122 Fed. 709.

The two fictitious defendants were not served with process until long after the removal. They likewise were not to be considered at the time the removal was granted.

Community Co. v. Maryland Co., 8 Fed. (2d) 678; certiorari denied 270 U. S. 652;

Galehouse v. B. & O. R. Co., 274 Fed. 370;

Kelly v. Alabama Co., 34 Fed. (2d) 790.

The complaint alleged that the decedent was employed by the defendant, the Southern Pacific Company, as a conductor upon an intrastate passenger train. It was not alleged, directly or indirectly, that he was engaged in interstate commerce. Therefore no cause of action was stated against his employer, the Southern Pacific Company, even though it might be generally engaged in interstate commerce. On these allegations plaintiffs' sole remedy against the Southern Pacific Company was before the

Industrial Accident Commission of the State of California under its Workmen's Compensation Act. (Statutes of California, 1917, p. 831, as amended.)

Tipton v. A. T. and S. F. Ry. Co., 298 U. S. 141.

In order to plead a cause of action under the Federal Employers' Liability Act it must be affirmatively alleged that the employee was engaged in interstate commerce.

Illinois Central Co. v. Behrens, 233 U. S. 473;
Second Employers Liability Cases, 223 U. S. 1;
Brinkmeier v. Mo. Pac. R. Co., 224 U. S. 268.

Furthermore, the action was brought by the heirs as co-plaintiffs. No action can be maintained by the heirs under the Federal Employers' Liability Act, but it must be brought by the personal representative of the deceased for the benefit of the heirs.

45 *U. S. C. A.* 51, 59;
Missouri, etc. R. Co. v. Wulf, 226 U. S. 570;
St. Louis, etc. R. Co. v. Seale, 229 U. S. 156;
American R. Co. v. Birch, 224 U. S. 547.

It is therefore clear that The Pullman Company was entitled to remove the case to the District Court when it did, and the case was properly removed.

POINT II.

The First Amended Complaint Filed in the State Court Did Not Destroy the Right of Removal and Did Not Present a Non-Removable Case.

The petition to remove was filed in the state court November 20, 1935 [Tr. p. 36]; it was presented to the court November 25, 1935 [Tr. p. 40], and the state judge ordered the removal at 10 a. m. the same day [Tr. pp. 31-40-41]. Plaintiffs' first amended complaint was filed in the state court November 25th, at 2:46 p. m. [Tr. p. 30]. On the filing in the state court of a sufficient petition and bond, in a removable cause, the jurisdiction of the state court absolutely ceases, and that of the District Court attaches, regardless of any action thereon by the state court; and any further proceeding in the state court is *coram non judice.*

Kern v. Huidekoper, 103 U. S. 485, 490;

B. & O. R. Co. v. Koontz, 104 U. S. 5;

Madisonville Tr. Co. v. St. Bernard Mining Co., 196 U. S. 239;

Chesapeake & Ohio R. Co. v. McCabe, 213 U. S. 207.

Furthermore, the right to a removal can not be defeated by an amendment to the complaint after the petition and bond for removal have been filed.

Clarke v. Mathewson, 12 Peters 164, 165;

Kanouse v. Martin, 15 Howard 198;

George Weston Ltd. v. New York Cen. R. Co., 115 N. J. Law 564;

Woods v. Massachusetts Protective Assn., 34 Fed. (2d) 501;

Kelly v. Alabama Quenelda Graphite Co., 34 Fed. (2d) 790.

POINT III.

The Motion To Remand Tested Validity of Removal in Light of Record in State Court.

A motion to remand is properly determinable on the facts appearing on the face of the record.

Harrington v. Great Northern R. Co., 169 Fed. 714;

Jones v. Casey-Hedges Co., 213 Fed. 43 (citing *Kentucky v. Powers*, 201 U. S. 1-33-34);

Herbert v. Roxana Petroleum Corp., 12 Fed. (2d) 81;

West Side R. Co. v. California Pac. R. Co., 202 Fed. 331;

So. Carolina v. Coosaw Mining Co., 45 Fed. 804; affirmed 144 U. S. 550.

POINTS IV AND V.

Plaintiffs Waived Any Right of Remand.

The Federal Employers' Liability Act (Title 45, U. S. C. A., Sec. 56) provides in part:

"* * * Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, * * *."

The second amended complaint filed in the District Court relied upon the Federal Employers' Liability Act

as against the Southern Pacific Company and by the terms of the statute itself that court had jurisdiction over the action.

Santa Fe Central R. Co. v. Friday, 232 U. S. 694;

Farrugia v. Philadelphia, etc. R. Co., 233 U. S. 352.

An amended complaint served and filed by leave of court is a substitute for the original in all respects and the cause proceeds upon it the same as if it was the original and only one in the case.

Washer v. Bullit County, 110 U. S. 558.

By amending the complaint in the District Court after removal and by stipulating with the defendants, plaintiffs accepted the jurisdiction of the District Court, thereby waiving any right of remand.

In re Moore, 209 U. S. 491;

Hagerla v. Mississippi River Power Co., 202 Fed. 776;

Enders v. Supreme Lodge, etc., 176 Fed. 832.

It has also been held that the prohibition against removal found in the Federal Employers' Liability Act (U. S. C. A. Title 45, Sec. 56) may be waived.

Stephens v. Chicago, M. & P. S. R. Co., 206 Fed. 854;

Strother v. Union Pacific R. Co., 220 Fed. 731.

In the absence of an exception the ruling will not be reviewed on appeal.

Fleischmann v. U. S., 270 U. S. 349;

Northwest Theatres Co. v. Hanson, 4 Fed. (2d) 471;

Sacramento Co. v. Melin, 36 Fed. (2d) 907;

Aetna Co. v. Reliable Co., 58 Fed. (2d) 100;

Saunders System v. Kelley, 30 Fed. (2d) 520.

Plaintiffs' failure to except is not cured by their assignment of error.

Goldfarb v. Keener, 263 Fed. 357.

POINT VI.

Where, in a Complaint Filed in a State Court, a Cause of Action Under the Federal Employers' Liability Act Against a Railroad Company Is Joined With Another Cause of Action Under a State Statute Against a Non-resident Defendant (Not the Railroad Company) Such Non-resident Defendant Can Remove the Case to the District Court.

It will be noted that the foregoing statement precisely applies to the case at bar. Herein The Pullman Company was the removing defendant and is a different corporation than the Southern Pacific Company. The Pullman Company is not a common carrier, nor is it subject to the provisions of the Federal Employers' Liability Act.

Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84.

The decedent was not in its employ.

The case of *Goetz v. Interlake S. S. Co.*, 47 Fed. (2d) 753, clearly establishes our point. In that case plaintiff sued in a state court an employer, the steamship company, for the alleged wrongful death of a seaman, basing the case on the Jones Act (Title 46 U. S. C. A., Sec. 688) identical with the Federal Employers' Liability Act, and for the same death in the same action sought damages from the Bethlehem Steel Corporation as to whom he was a licensee.

The case was removed to the District Court where, in a well reasoned opinion, Woolsey, District Judge, held that it was properly removed. In the course of his opinion, after referring to the prohibition against removal found in the Federal Employers' Liability Act, Judge Woolsey said:

> "It seems to me, after a careful reading of many opinions which have been rendered in regard to the propriety of the removal of actions under Employers' Liability Act cases, that the prohibition was intended only to take from the defendant employer—perhaps in order to relieve the calendars of the federal courts—any choice of forum, and leave that choice wholly in the plaintiff employee under the provision for concurrent jurisdiction of the federal and state courts contained in the act.
>
> "Because of this provision for concurrent jurisdiction, however, it seems to me that a stronger argument can be made for trying the whole case in the federal court, than can be made in the usual instance where action is brought against a resident and a non-resident defendant and removed by the latter on the ground of separable controversy, of which Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, is the typical and authoritative example."

The foregoing appears to be the only case squarely passing upon the precise question.

There have been, however, many cases in the district courts dealing with a situation where, in one complaint against a single non-resident defendant, one cause of action under the Federal Employers' Liability Act has been coupled with a cause of action under a state statute or the common law and where the defendant has sought to remove the case from the state court.

Until the decision in the instant case, the case of *Jacobson v. Chicago, M. St. P. & P. R. Co.*, 66 Fed. (2d) 688, was the only decision of a Circuit Court of Appeals on the subject. In that case the Eighth Circuit Court of Appeals held that, although the plaintiff had brought suit against his employer, a railroad company, in one complaint, nevertheless there were set out two causes of action, one bottomed on the Federal Employers' Liability Act, and the other on the Montana statutes. The case was removed to the federal court, and in considering the contention that it had been improperly removed, the court said:

> "Federal courts have original jurisdiction in actions for injury to or death of railroad employees under the same conditions that determine their authority in other suits at law, and an action based upon the Federal Employers' Liability Act is manifestly a suit of a civil nature arising under the laws of the United States within the meaning of the Federal Judicial Code (Sec. 34 (28 USCA Sec. 41)), and hence is within the jurisdiction of the federal District Courts.

Assuming that the necessary diversity of citizenship exists, plaintiff might in the first instance have brought the action against defendant in the federal court. It cannot, therefore, be said that the court was inherently without jurisdiction to try the action. Actions arising under the Federal Employers' Liability Act, if brought in a state court of competent jurisdiction, are not removable to the federal court. The question of the removability of a cause of action is ordinarily to be determined by the federal court upon motion to remand. In the instant case, the federal court had jurisdiction notwithstanding the fact that the action may have been improperly removed, a question which we later consider, and the plaintiff failed to move to remand the case. This, we think, was a waiver of plaintiff's right, if he had such, to have the cause tried in the state court. But, quite aside from this conclusion, it is observed that plaintiff pleaded two causes of action. The cause of action based upon the Montana statutes was clearly removable, and, that being true, defendant properly removed the case to the federal court. (Citing cases.)

"The question was considered in Strother v. Union Pac. R. Co., *supra,* where, in a well-considered opinion by Judge Van Valkenburgh, it is said:

" 'If a cause of action arising under the federal act is coupled with one arising under a state statute or at common law, stated in the alternative in separate counts, the plaintiff preserving the right, under recognized rules of local procedure, to make his election and avail himself of either at the close of the evidence, the right of removal is presented more baldly at the threshold of the case. There is present at the same time a case arising under the federal act, and

therefore, standing alone, not removable, and one not arising under that act, and therefore, the citizenship being diverse, admittedly susceptible of being removed. Must the defendant await the action of the plaintiff at the close of the evidence before claiming the right, and, if so, is his relief then clear and complete? The Supreme Court has thus far refrained from settling such procedure, although it has intimated that the defendant should not necessarily be deprived of relief.

"'It rests with plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it.'

"These views so clearly stated by Judge Van Valkenburgh are in accord with our own, and we conclude that the lower court had jurisdiction to try the action."

There is a sharp and irreconcilable conflict among the decisions of the lower federal courts in such cases.

The following cases uphold such right:

Patterson v. Bucknall S. S. Lines, Ltd. (D. C.), 203 Fed. 1021 (S. D. New York 1913);

Stephens v. Chicago, etc. R. Co. (D. C.), 206 Fed. 854 (D. Idaho 1913);

Strother v. Union Pacific R. Co. (D. C.), 220 Fed. 731 (W. D. Missouri W. D. 1915);

Flas v. Ill. Central R. Co. (D. C.), 229 Fed. 319 (D. Nebraska 1916);

Bedell v. Baltimore & O. R. Co. (D. C.), 245 Fed. 788 (N. D. Ohio E. D. 1917);

Givens v. Wight (D. C.), 247 Fed. 233 (N. D. Texas 1918);

Goetz v. Interlake S. S. Co., et al. (D. C.), 47 Fed. (2d) 753 (S. D. New York 1931);

Maruska v. Equitable Life Assurance Soc. (D. C.) 21 Fed. Supp. 841 (D. Minn., 3d Div. 1938);

The following cases deny such right:

Ullrich v. N. Y. N. H. & H. R. Co. (D. C.), 193 Fed. 768 (S. D. New York 1912);

Rice v. Boston & M. R. R. (D. C.), 203 Fed. 580 (N. D. New York 1913);

Peek v. Boston & M. R. R. (D. C.) 223 Fed. 448 (N. D. New York 1915);

Jones v. So. Ry. Co. (D. C.), 236 Fed. 584 (N. D. Georgia 1916);

Mitchell v. So. Ry. Co. (D. C.), 247 Fed. 819 (N. D. Georgia 1917);

Reese v. So. Ry. Co. (D. C.) 26 Fed. (2d) 367 (N. D. Georgia 1928);

Thompson v. St. Louis-San Francisco R. Co. (D. C.), 5 Fed. Supp. 785 (N. D. Oklahoma 1934.)

We respectfully desire to attract the Court's special attention to the fact, however, that all of the foregoing cases, except that of *Goetz v. Interlake S. S. Co., et al., supra,* were cases in which, although two causes of action were stated in the complaint filed originally in a state court, there was but a single defendant in the case. In that respect, therefore, all of such cases, except the *Goetz* case, differ from the case at bar.

POINT VII.

Jurisdiction of the District Court Over a Case Properly Removed Can Not Be Ousted by Any Subsequent Amendment to the Pleadings or Any Change in Conditions.

This principle was announced in the early case of *Kanouse v. Martin,* 15 Howard 198, wherein it was said:

> "Without any positive provision of any Act of Congress to that effect, it has long been established, that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it."

Subsequently in the case of *Kirby v. American Soda Fountain Co.,* 194 U. S. 141, Mr. Chief Justice Fuller said:

> "In the second place, it is the general rule that when the jurisdiction of a circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions.
>
> * * * * * * * *
>
> "The jurisdiction thus acquired by the circuit court was not divested by plaintiff's subsequent action."

Finally in the recent case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, ... U. S. ....., 82 L. Ed. 541, 58 Sup. Ct. 586, this principle was exhaustively examined and re-affirmed. Mr. Justice Roberts emphatically points out that, but for this well settled and salutary principle, a defendant's statutory right of removal would be subject to plaintiff's caprice and that plaintiff ought out to be able to defeat this right and bring the cause back to the state court at his election. It was held that where the petitioner was entitled, on the face of the pleadings in the state court, to invoke the jurisdiction of the federal court, no subsequent amendment in the federal court could take away that right.

POINT VIII.

The Judgment of the Circuit Court Is In Conflict With the Decisions of Two Other Circuit Courts of Appeal.

Under Point VI, *supra*, we have referred to and discussed the case of *Jacobson v. Chicago, M. St. P. & P. R. Co.*, 66 Fed. (2d) 688 (8th Circuit). In the instant case the Circuit Court, in order to reverse the District Court, held that if plaintiffs' complaint, when filed in the state court, had stated a cause of action against the Southern Pacific Company under the Federal Employers' Liability Act, the Pullman Company, sued under a state law, would not have been entitled to remove. This holding is squarely in conflict with the *Jacobson* case, which holds that the coupling of a non-removable cause of action (under the

Federal Employers' Liability Act) with a removable cause of action does not prevent a removal.

The same principle was approved and adopted by the Tenth Circuit Court of Appeals in the case of *Mecom v. Fitzsimmons Drilling Co.*, 47 Fed. (2d) 28, reversed by this Court on other grounds, 284 U. S. 183. In that case two causes of action were united in one complaint filed in a state court from which a removal was effected. The Circuit Court held that one of the causes of action could not have been brought in the District Court, nor standing alone could it have been removed thereto. It also held that the other cause of action was removable. The Court said:

> "However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the cause of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf."

Thus it will be seen that the decision in the instant case is in direct conflict with the decisions of the Eighth and Tenth Circuit Courts of Appeal. Under Point VI, *supra*, we have shown the utter confusion and conflict on this point existing among the district courts. It is submitted that to allow this decision of the Ninth Circuit Court of Appeals to stand will further increase such confusion and conflict.

POINT IX.

The Judgment of the Circuit Court Departs From Principles of Law Pronounced by This Court.

Under Point VII, *supra,* we have demonstrated that this Court has announced and adhered to the rule that once the jurisdiction of the federal courts has attached by removal of a case thereto, a plaintiff can not, by amendment, divest the District Court of jurisdiction. The Circuit Court has here held that, although the Pullman Company was entitled to remove upon the state of the record in the state court, nevertheless the amendment in the District Court, pleading a cause of action under the Federal Employers' Liability Act against the Southern Pacific Company and a cause of action against the defendant Hatch, so related back to the date of filing in the state court as to divest the District Court of all jurisdiction. If such is to be the law obtaining in the Ninth Circuit, a non-resident's rights under the removal statutes will be lost and the jurisdiction of the federal courts in removed cases may be ousted by the whim, ingenuity or caprice of plaintiffs. We earnestly submit that this court should not tolerate such a departure from the principles which it has pronounced.

POINT X.

The Circuit Court Has Ruled Upon Two Important Questions of Federal Law Which Have Not Been, But Should Be, Decided by This Court.

1. The Circuit Court has held that the joinder of a cause of action under the Federal Employers' Liability Act with a removable cause of action in one complaint in a state court destroys the right of a non-resident defendant to remove to the federal courts the removable cause of action pleaded against it.

This question has not been decided by this Court. The Eighth Circuit has held to the contrary in the *Jacobson* case, *supra*. Well reasoned opinions of many District Courts have likewise held to the contrary. Other District Courts have arrived at the same conclusion reached in the instant case. The rights of litigants under two important federal statutes, the Federal Employers' Liability Act and the provisions of the Judicial Code governing removals, should in this case be finally determined by this Court.

2. The Circuit Court has decided that the ultimate pleading of causes of action under the Federal Employers' Liability Act against the Southern Pacific Company and under the state statute against the defendant Hatch in the District Court related back to the original filing in the state courts so as to destroy The Pullman Company's right of removal and oust the jurisdiction of the District Court.

This precise question has never been decided by this Court. The *St. Paul Mercury Indemnity* case, *supra,* held that a reduction of the amount in controversy below the jurisdictional requirement does not oust the federal jurisdiction once it has attached. By a parity of reasoning, even though this Court may hold that a removable cause of action can not be removed if joined with a properly pleaded cause of action under the Federal Employers' Liability Act, there would still remain the question we are now discussing. Of course, if this Court reverses the Circuit Court upon the first question under this point, the second question disappears. If the Circuit Court be sustained upon the first question, then this Court should answer the second question. It is respectfully urged that upon the authority of the *St. Paul Mercury Indemnity Company* case, *supra,* the Court must hold that plaintiffs' second amended complaint filed in the District Court did not so relate back as to destroy The Pullman Company's right of removal and oust the jurisdiction of the District Court. The question is of the utmost importance, for otherwise the jurisdiction of the federal courts in removed cases will always be uncertain and subject to ouster at any time before final judgment at the caprice of plaintiffs.

POINT XI.

Had the Circuit Court Considered the Case on Its Merits, the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U. S. 555, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals, the entire record is before this Court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court. The judgment and opinion of the District Court (17 Fed. Supp. 820) was correct and is approved by Circuit Judge Mathews in his dissenting opinion [96 Fed. (2d) 405, Tr. p. 157 *et seq.*]. In view of this Court's decision in the recent case of *Erie Railroad Co. v. Harry J. Tompkins,* ..... U. S....., 82 L. Ed. 787, decided April 25, 1938, we call attention to the fact that the decision of the District Court is in accord with the local law. The latest decision of the California courts on the subject is found in the case of *Lewis v. Johnson,* 93 Cal. App. Dec. 638, ... Pac. (2d) ....., decided May 27, 1938. This decision conclusively establishes that a covenant not to sue, coupled with a dismissal, constitutes a release.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court for the Southern District of California, Central Division, be affirmed, and the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed in order that justice may be done to petitioners; and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

ROBERT BRENNAN,
LEO E. SIEVERT,
H. K. LOCKWOOD,
Counsel for the Pullman Co., Petitioner.

C. S. WILLISTON,
Chicago, Illinois,
M. W. REED,
Los Angeles, California,
Of Counsel for The Pullman Company.

DAVID LIVINGSTON,
LAWRENCE LIVINGSTON,
Counsel for A. J. Kash, Petitioner.

LIVINGSTON & LIVINGSTON,
LEONARD J. BLOOM,
Of Counsel for A. J. Kash.